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In the Supreme Court of the United States

No. 125.

OCTOBER TERM, 1958.

HENRY H. PLEASANT,
Petitioner,

vs.

CLEVELAND BAR ASSOCIATION,
Respondent.

REPLY BRIEF FOR PETITIONER.

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This reply brief is submitted for three reasons: first, to dispel any confusion resulting from apparent discrepancies in the facts as presented by the petitioner and respondent, as well as by certain inaccuracies in the respondent's brief; second, to emphasize the significance of a constitutional issue which the respondent has failed to controvert; third, to direct to the attention of the court a decision by the Criminal Court of Appeals of the State of Oklahoma, rendered on September 3, 1958, after all of the prior briefs in this case had been filed, which has an important bearing on one of the vital constitutional questions involved in this case.

FACTS.

The respondent charges the petitioner with "inaccuracies" in the presentation of the facts and undertakes to fortify its charge with two examples cited on pages 6 and 7 of respondent's brief. Such charges, particularly when made by a bar association, should not be permitted to go unchallenged when they are incorrect and without foundation.

Respondent denies the petitioner's assertions that under the provisions of Rule 27 of the Supreme Court of Ohio, the petitioner's right to appear before that court is only a matter of grace. Section 19 of that Rule, set forth on page 8a of the appendix to the petition, states:

> "Upon failure of respondent to file objections within the time limited above, or after consideration of such objections and such briefs as may be filed for and against the same, *and after hearing, if requested by this court,* this court shall enter such order upon the matter as it may find proper * * *."

This language makes it clear that not only is the appearance of the petitioner himself a matter of grace, subject to a "request" of the court, but the very right to a hearing before the court itself and the appearance of petitioner's counsel before that court, is a matter of grace which may take place only "if requested by (the) court."

Respondent denies the petitioner's assertion that under the provisions of Rule 27 petitioner has no right to appear in person or by counsel before the Board of Commissioners. Section 14 of the Supreme Court Rule (App. 6a) provides that:

> "Upon review, said Board of Commissioners may refer the matter back to the panel for further hearing, or may order a further hearing to be presented before said Board of Commissioners, or may proceed upon the certified report of the prior proceedings before the panel. Upon the final review, the Board of Commissioners may dismiss the complaint or find that the respondent is guilty of misconduct."

While the petitioner and his counsel may have a right to appear before the Board of Commissioners *if* the Board orders "a further hearing," it is a matter of record in this case that neither the petitioner nor his counsel at any

time were accorded the right to appear before the Board. And, of course, it cannot be disputed that under the language of the above rule the right of the petitioner to appear before the Board is purely a matter of grace, subject to an order for a further hearing in the event the Board of Commissioners is so inclined.

It is contended that no statute and no rule accords a party due process of law unless the party may appear in person, as a matter of right, as well as be represented by counsel before a court, a board or an agency, which has been vested with the power to determine questions of law or of fact affecting the life, liberty or the property of such party. If the appearance before the court, the board or the agency is purely a matter of grace and may be denied at will, the requirements of due process of law have not been filled.

It is a matter of record in this case that the petitioner and his counsel appeared only before three members of the seventeen-member Board of Commissioners, and that no hearing before the Board of Commissioners was ever had. The only persons who heard the petitioner in this case were a panel of hearing members twice removed from the authority of the Supreme Court of Ohio and appointed not by that Court, but by the elected chairman of the Board of Commissioners.

We trust that the foregoing will dispel any confusion resulting from a denial of statements in the petition which are, in fact, correct.

Incorporated as the respondent's presentation of the "facts" is the opinion of the Supreme Court of Ohio in the instant case. Included therein is the quotation by that Court of its syllabus in the prior related case of *In Re Estate of Wright*. The implication necessarily resulting

from this manner of presentation is that the evidence in the *Wright* case and in the case at bar was the same. Again, this is incorrect.

The complaint filed by the respondent in this case charging the petitioner with having committed a fraud upon the Probate Court, is based upon the finding by the Supreme Court of Ohio set forth in the third paragraph of the syllabus in the *Wright* case (p. 5 respondent's brief). The Supreme Court declared in the *Wright* case that where an attorney, who is also an administrator of an estate, enters into a contract for fees which are to be paid by a sole heir out of what he receives from the estate, in filing his account, "makes no disclosure of such arrangement to the Probate Court in whose jurisdiction such estate is being administered, and such court proceeds to confirm the final account of such administrator, *which it probably would not have done had it known of the arrangement*, such administrator thereby perpetrates a fraud upon the court."

It is obvious from the language employed by the Supreme Court of Ohio in the *Wright* case that it was indulging in conjecture as to what the Probate Court "probably would not have done had it known of the arrangement."

In this case, the petitioner presented as one of his own witnesses the Probate Judge to whom he had submitted his account. The Probate Judge after examining the account on the witness stand, declared that no fraud had been committed upon the court and that if he had known of the arrangement made between the petitioner and his client, it would have made no difference whatsoever to him, as Judge of the Probate Court, and he would have made no different ruling, but would have confirmed the account precisely as he did.

One of the important constitutional questions presented in this case results from the pronouncement by the Supreme Court of Ohio in 1958, of what is stated by the court to be a rule of law in Ohio, which was wholly unknown to the bench and to the bar when the petitioner filed his account with the Probate Court in 1949. By applying this rule of law to the conduct of the petitioner nine years earlier when the petitioner had no reason to believe or to know that such a rule existed, the Supreme Court of Ohio has deprived the petitioner of his right to practice law, without due process of law, as surely as if the same result had been achieved by means of retroactively enforced legislation. This contention, set forth in the petition, has not been controverted by the respondent.

This constitutional question is inextricably bound to the finding of fraud upon which the charges against the petitioner were based and sustained. Dozens of pages of the record of testimony before the hearing panel were devoted to an attempt to establish that there was a rule of the Probate Court, or a "requirement" of the court, or some "practice" compelling the petitioner, as administrator, to include in his account to the court the omitted item of attorney fees.

It must be apparent that if there had been in effect in Ohio in 1949 a statute which was known to the bench and to the bar as the source of a requirement compelling the petitioner to include in his account the fee received by him from his client, it would have been both unnecessary and futile to devote to this issue the extraordinary amount of testimony appearing in the record.

This brief, of course, provides no appropriate opportunity for a full discussion of the proposition. A few brief illustrations will serve to clarify the petitioner's plight. From the testimony of Nelson J. Brewer, the Probate

Judge to whom the petitioner's account was rendered, we quote:

Page 274:

"Q. I will ask you whether or not on September 20th of the year 1949, or on September 23, 1949, if there was any rule of the Probate Court of Cuyahoga County, requiring a fiduciary, acting in a dual capacity, both as the administrator of the estate and as the attorney thereof, to show in his final account what fees he charged?

A. I know of no such rule.

Q. Assuming, Judge Brewer, that the evidence in this case would show that the respondent, Henry H. Pleasant, spent 125 to 130 hours, both in his capacity as the administrator of the estate and in his capacity as the attorney therein, and that he also spent approximately 10 hours representing the sole legatee in resisting a claim of an alleged common-law wife of an alleged illegitimate son and the claim for services, would there be any rule in Probate Court in effect in the month of September, 1949 requiring the individual, Henry H. Pleasant, acting in, let's say, a triple capacity, administrator, attorney for the administrator, and even going so far as a representative of the sole heir, was there any rule or requirement requiring him to disclose what fees he had received from this estate?

A. No."

Page 281:

"Q. Let me ask you this question, Judge. In September of 1949, where you had a situation involving a sole heir and a relationship of attorney and client existing, did you, as a Probate Judge, concern yourself in the least concerning whatever arrangements were made with relation to fees between the attorney and the client?

A. I certainly would not."

Page 282:

"Q. I will ask you, Judge, whether or not in September of 1949, you having examined today the administrator's account that was filed in this estate as to whether or not there was a fraud committed upon the Probate Court of Cuyahoga County, Ohio on September 23, 1949, when this administrator's final account was filed?

A. I think not."

Page 299:

"Q. You had previously stated that you were concerned as a court with whether or not fees were being charged from the assets of the estate, isn't that true?

A. May I answer this question in this way. Many, many accounts come through with no charge for attorney's fees, and that goes for many big law firms as well as individual lawyers. They collect from the heirs rather than have it spread upon the court's records of how much fees were charged against the estate."

Page 300:

"Q. Judge Brewer, what was the custom in the year 1949, when you were Judge of the Probate Court, with relation to lawyers reporting or not reporting their fees in the final account?

A. Well, the custom was, sometimes it was done and sometimes it wasn't."

Testimony similar to the above given by the Probate Judge, was given by three of his chief deputies. When the Supreme Court of Ohio, in 1958, pronounced a rule regarding the inclusion of attorney fees in administrator's accounts, it was pronouncing a rule which was utterly unknown in 1949 when the petitioner's account was filed. The above quoted testimony of the Probate Judge makes that clear. Surely, it is of the utmost significance that in

the decision in this case in which the rule was pronounced by the Supreme Court of Ohio, not a single other decision even alluding to that rule could be cited by the court.

The petitioner earnestly contends that under such circumstances the court had no right even to criticize or to chastise the petitioner, much less to disbar him, for failing to observe a rule of law, the existence of which was wholly unknown even to the court itself.

THE CONFLICT BETWEEN THE COURT AND THE LEGISLATURE.

The petition ir this case discussed at length the unconstitutional assumption by the Supreme Court of Ohio of legislative power in the enactment of Rule 27 and the nullification of a series of Ohio statutes. The validity of the petitioner's contention in this regard is dramatically illustrated in a decision by the highest criminal court of the State of Oklahoma, the Criminal Court of Appeals. This decision in the case of *Lyles vs. The State of Oklahoma* was rendered on September 3, 1958 after all prior briefs in this case had been completed and filed. The first paragraph of the syllabus in that case stated:

> "The adoption of the Canons of Ethics by the courts did not give the canons force of law. They are nothing more than a system of principles of exemplary conduct and good character. They are recommended to the bench and bar as patterns which, if adhered to, will promote respect for the bar and better administration of justice. They are subject to modification to meet the conditions of changing times in keeping with the constitutional rights of the people."

This most recent pronouncement directly supports the petitioner's contention that the Supreme Court of Ohio

has no right to legislate, particularly where such judicial legislation had the effect of nullifying long-existing statutes.

In this same year, 1958, the Supreme Court of the State of Colorado has issued a similar pronouncement, in the case of *Petition of the Colorado Bar Association*, decided on May 13, 1958 and reported in 325 Pac. 2d 932. That court stated:

Syl. 3:

"The 'adoption' of the Canons of Professional and Judicial Ethics by the Supreme Court did not give them the force and effect of law, for breach of which one could be subjected to disciplinary action."

This issue is directly injected into the case by the statement appearing on page 17 of the respondent's brief:

"Moreover, at the beginning of the hearing before the panel in response to a request by counsel for respondent, the petitioner was advised specifically that he had violated Sections 6, 29, 32 and 38 of the Canons of Professional Ethics."

The Supreme Court of Ohio had similarly, a number of years ago, "adopted" the Canons of Professional Ethics, and incorporated them as one of the rules of the Supreme Court. In this case, as in a prior case, the Supreme Court of Ohio has undertaken to enforce obedience by members of the bar to such canons of ethics as though the canons had in Ohio the force and effect of law.

This enforcement has been undertaken by disciplinary proceedings, notwithstanding the fact that in so doing the Supreme Court of Ohio has indulged in legislation which again nullifies an Ohio state of long standing. This was done in the case of *In Re McBride*, 164 O. S. 419, 132 N. E. 2d 113 (Pet. p. 38), Petition for Writ of Certiorari denied, 351 U. S. 965, 76 S. Ct. 1030.

Revised Code Sec. 4705.02 confers upon the courts of Ohio the right to discipline an attorney "for misconduct or unprofessional conduct in office involving moral turpitude or for conviction of a crime involving moral turpitude." In the case at bar, as well as in the *McBride* case, the Supreme Court of Ohio has undertaken entirely to disregard this requirement of the Ohio statute.

The Supreme Court of Colorado, in the case above cited, *Petition of the Colorado Bar Association*, 325 Pac. 2d 932, has declared:

Syl. 1:

> "A professional license cannot be revoked or disciplinary action taken against an attorney at law merely for a violation of standards of ethics, and to be actionable in disciplinary proceedings conduct complained of must amount to a violation of law, or it must involve moral turpitude or dishonorable conduct."

In issuing this pronouncement, the Supreme Court of Colorado has simply stated that to be the law which was incorporated by the Ohio Legislature many years ago in the provisions of what is now Revised Code Section 4705.02.

The evidence in this case discloses beyond a doubt that there was no moral turpitude involved in the conduct of the petitioner in failing to comply with a rule of law which he did not even know existed. Here, again, there is in this case the fundamental conflict between the right of the Legislature and the right of the Supreme Court in Ohio to regulate and to govern the conduct of the petitioner as a member of the bar. Only this Court, and no other, can resolve this fundamental conflict and it is a conflict which one day must be resolved.

For the many reasons advanced, the petitioner respectfully urges that the petition for a writ of certiorari in this case be granted.

Respectfully submitted,

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